

DEPARTMENT OF THE TREASURY

31 CFR Part 50

RIN 1505-AB09

**Terrorism Risk Insurance Program: Additional Claims Issues; Insurer
Affiliates**

AGENCY: Departmental Offices, Treasury.

ACTION: Final Rule

SUMMARY: The Department of the Treasury (Treasury) is issuing this final rule as part of its implementation of Title I of the Terrorism Risk Insurance Act of 2002 (Act). The Act established a temporary Terrorism Insurance Program (Program) under which the Federal Government will share the risk of insured loss from certified acts of terrorism with commercial property and casualty insurers until the Program ends on December 31, 2005. This final rule clarifies that, for purposes of calculating direct earned premium and insurer deductibles and meeting the requirements for claiming the Federal share of compensation for insured losses for any Program Year, an insurer's affiliates will be determined based on the insurer's circumstances as of the date of occurrence of the act of terrorism that is the first act of terrorism certified by the Secretary for that Program Year.

DATES: This final rule is effective [INSERT DATE THIRTY DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Howard Leikin, Senior Insurance Advisor, or David Brummond, Legal Counsel, Terrorism Risk Insurance Program, (202) 622–6770 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On November 26, 2002, the President signed into law the Terrorism Risk Insurance Act of 2002 (Pub. L. 107–297, 116 Stat. 2322). The Act was effective immediately. The Act’s purposes are to address market disruptions, ensure the continued widespread availability and affordability of commercial property and casualty insurance for terrorism risk, and to allow for a transition period for the private markets to stabilize and build capacity while preserving state insurance regulation and consumer protections. Title I of the Act establishes a temporary Federal program of shared public and private compensation for insured commercial property and casualty losses resulting from an act of terrorism, which as defined in the Act is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General. The Act authorizes Treasury to administer and implement the Terrorism Risk Insurance Program, and to

issue regulations and procedures. The Program provides a Federal reinsurance backstop for three years. The Program ends on December 31, 2005. Thereafter, the Act provides Treasury with certain continuing authority to take actions as necessary to ensure payment, recoupment, adjustments of compensation, and reimbursement for insured losses arising out of any act of terrorism (as defined under the Act) occurring during the period between November 26, 2002, and December 31, 2005.

Each entity that meets the definition of “insurer” (well over 2000 firms) must participate in the Program. The amount of the Federal share of compensation for an insured loss resulting from an act of terrorism is to be determined based upon insurance company deductibles and excess loss sharing with the Federal Government, as specified by the Act and the implementing regulations. An insurer’s deductible increases each year of the Program, thereby reducing the Federal Government’s share prior to expiration of the Program. An insurer’s deductible is calculated based on a percentage of the value of direct earned premiums collected over certain statutory periods. Once an insurer has met its deductible, the Federal payments cover 90 percent of insured losses above the deductible, subject to an annual industry-aggregate limit of \$100 billion.

II. Proposed Rule and Overview of Comments

Under the Act and regulations, “affiliates” are treated collectively as one insurer for purposes of calculating the insurer deductible for a Program Year. Treasury issued a proposed rule on insurer affiliations, with a request for comment, on January 18, 2005

(70 FR 2830). The proposed rule would have clarified subpart F of 31 CFR part 50, the claims procedures for insurers seeking the Federal share of compensation for insured losses. The proposed rule added new section 50.55, which provided that for purposes of subpart F, an insurer's affiliates for any Program Year are to be determined based on the insurer's circumstances as of the date of the first certified act of terrorism in that Program Year. This clarification was needed because affiliations of insurers may change over the course of a Program Year and there may be more than one certified act of terrorism in a Program Year. After careful consideration of comments on the proposed rule, Treasury is now issuing this final rule.

Treasury received one comment on the proposed rule from an ad hoc industry working group that included members from eight national property-casualty insurance trade associations, collectively representing insurers, reinsurers and producers. The commenter disagreed with the proposed rule, asserting that adoption of the "fixed" affiliate status approach would lead to unintended compliance and administrative consequences for the industry and Treasury in the event of multiple terrorist acts during a Program Year. The working group recommended that Treasury adopt a regulation that would: "(a) tie Treasury or insurer action (e.g., reporting, claim payment) pursuant to TRIA to an insurer's affiliate status as of the date of that action; and (b) determine an insurer's TRIA deductible based on affiliate status as of the date of each certified terrorism event in any given Program Year."

Treasury appreciates the concerns raised by the commenter and has thoroughly reviewed the material provided. With the potential for changes in insurer affiliations during the year, an annual deductible presents implementation problems no matter how a final rule is constructed. However, the Act defines an insurer deductible on a Program Year basis. As further explained below in response to specific concerns, Treasury believes that, overall, fixing affiliations as of one event in a Program Year presents a more comprehensive solution to all of the potential implementation problems. After reviewing the comment provided, however, Treasury is modifying the proposed rule in certain respects to clarify and improve how the regulation would be applied. Specifically, the final rule provides that an insurer's affiliates are determined by the circumstances existing on the date of occurrence of the act of terrorism that is the first act of terrorism in a Program Year to be certified by the Secretary for that Program Year. In addition, based on the comment presented, Treasury intends to provide for enough flexibility in its administration of the claims and payment process to accommodate, where possible, particular insurer circumstances.

To assist in explaining its position, the commenter constructed several hypothetical scenarios which served to illustrate the concerns with the proposed rule.

1. The industry working group presented Treasury with an example to illustrate how deductible and Federal share calculations would be applied with its suggested approach to affiliations, *i.e.*, considered as of each certified act. In Treasury's view, the suggested approach of calculation of the deductible at each event essentially produces an

approach that blends a “per event” methodology with a methodology based on insurer affiliations as of the last certified act of terrorism in a Program Year. As more specifically explained in (a) – (d) below, after careful review of the example, Treasury continues to believe that the first certified act of terrorism must be the point in time that establishes insurer affiliations.

(a) The working group’s approach relies on Treasury having to assume how the Federal payments for a first event are distributed within the insurer group in order to determine the appropriate deductible applicable to the new configuration of affiliations as of a second event. Specifically, the example provided assumes that Federal payments are allocated among affiliates in proportion to their share of the total insured losses of their insurer group. This may not be the way payments are actually allocated.

(b) The example presents a simplified scenario where all claims from a first certified act of terrorism have been settled and paid prior to an insurer seeking the Federal share for claims arising from a second certified act. In a real situation it is much more likely that claims from the first event will continue to be submitted even as claims from the second event are presented. Thus, in such a scenario, it is unclear what deductible should be applied for losses arising out of the first event. Treasury anticipates that the administrative burden in processing such a mixture of claims exceeds the reasonable capabilities of the reporting and processing systems.

(c) The working group's approach shifts deductible amounts based on the direct earned premium for an individual insurer within an insurer group to another insurer group as affiliations change. The suggested methodology for determining the group deductible for the new affiliation at the time of a subsequent certified act of terrorism can lead to duplicative application of deductible amounts within a single Program Year. This is contrary to the Act's requirement of applying a single calendar year deductible to the insured losses of insurers.

(d) As noted above, the Act requires the application of a single calendar year deductible to the insured losses of each insurer. Since Treasury has no separate contracts with insurers, there is less flexibility in dealing with the allocations and calculations proposed by the commenter than what the commenter suggests. The working group's approaches to allocating the deductible and to calculating the Federal share seem more appropriate as items subject to negotiation in crafting the terms of a merger or acquisition agreement than a Federal rulemaking.

2. The working group noted that pursuant to the proposed rule, in a Program Year with multiple certified acts of terrorism, even a minimal first event involving insured losses for only one insurer would fix affiliations for the entire industry. The working group also noted that the order in which events are actually certified as acts of terrorism may be different than the order in which such events occurred. Consequently, the proposed rule could result in claims reporting and Federal payments being made under a

set of affiliations that does not match the affiliations that were in place at the time of the first act of terrorism in a Program Year.

Treasury has extensively reviewed both of these concerns. Having concluded that calculating the insurer deductible and processing the Federal share of compensation requires insurer affiliations to be fixed at a single point in a Program Year, Treasury examined how, within that constraint, the commenter's two concerns could be addressed. To address the first concern, *i.e.*, minimal first event fixing affiliations for the entire industry, Treasury reconsidered the alternative discussed in the preamble of the proposed rule of establishing affiliations as of the first event for which an insurer, or any affiliates, actually had insured losses. In reexamining this alternative in conjunction with addressing the second concern, *i.e.*, the order in which acts of terrorism are certified may be different than the order in which the acts occur, it became apparent that crafting a final rule that would address both concerns raised by the working group resulted in an overly complex process for determining affiliations. Treasury has concluded that it is more important to clarify that the first certified act of terrorism will be based on the certification date, not the occurrence date of the underlying act giving rise to certification. This will allow for the expeditious processing of claims for the Federal share without having to depend on a certification being made for a prior terrorist event that may still be under investigation. For the final rule, Treasury has thus clarified the regulation to provide generally that an insurer's affiliations are determined by the circumstances on the date of occurrence of the act that is the first act of terrorism certified by the Secretary for the Program Year. This is illustrated in the following example.

A possible act of terrorism occurs in March for which investigations begin. In the meantime a second terrorist event occurs in September that is readily identifiable as an act of terrorism under the Act and is certified by the Secretary in October. The March event is certified by the Secretary in November. In this case, the first certified act used to determine affiliations for the Program Year would be the September terrorist event. Affiliations would be fixed for the entire Program Year as of the occurrence date of the act of terrorism in September.

3. The working group stated that the proposed rule would not treat insurers equitably because as affiliations change, the effective deductible for an insurer deviates from the Act's mandated 15 per cent for Program Year 3. Treasury disagrees that the proposed or final rule results in inequitable treatment of insurers. The working group's example calculations, based on its hypothetical scenarios, purport to show that the proposed rule results in the insurer deductible deviating from the mandated 15 per cent of "direct earned premium" (DEP) for a second act of terrorism. This point is based on the premise that the deductible can vary as of each event based on the affiliations at the time of each event. This is not possible with an annual deductible as mandated by the Act. The commenter's proposal would result in the re-computation of deductibles and payments for losses for the entire Program Year based on affiliations as of the last act of terrorism in the Program Year. The same logic used in the example could then be applied to the prior event to show that now the deductible in that first event deviated from the required 15 per cent insurer deductible. Treasury's rule applies the deductible, set at 15

per cent of DEP for the affiliated structure at the time of the first terrorism event, consistently throughout the Program Year.

4. The working group asserted that complications would arise from the proposed rule's impact on producers because disclosure requirements may have been met by sending the disclosures through producers. The commenter noted that the proposed rule's "fictional" affiliations could require an agent to assist an insurer in certifying compliance with the Act's notice requirements where the agent no longer has any legal relationship with the insurer. Treasury appreciates the concern raised by producers that they may be called upon to assist an insurer in certifying compliance. The issue that is raised, however, is not related to the Program's proposed treatment of affiliations, but is rooted in the fact that affiliations may change over time, even in the aftermath of a single event or independent of any event. Treasury expects an insurer to be able to certify that disclosures have been made and that records are available for audit, if necessary. Treasury has recognized that insurers may or may not carry out their disclosure responsibilities through producers. Whatever approach is taken is an insurer decision on how to comply with the Act's disclosure requirements. In any case, Treasury believes the decision to call upon producers to certify or otherwise document insurer compliance with the Program's disclosure requirements is a prerogative of the insurer.

III. Final Rule

The final rule adds new section 50.55 and provides that for the purposes of subpart F (Claims Procedures), an insurer's affiliates for any Program Year shall be

determined by the circumstances existing on the date of occurrence of the act of terrorism that is the first act of terrorism in a Program Year to be certified by the Secretary. The final rule also includes a technical change to the definition of “affiliate” in section 50.5(c) to provide a cross-reference to section 50.55.

This final rule provides additional guidance to insurers on how affiliations will be viewed for purposes of calculating the insurer deductible under the Act and otherwise meeting requirements of subpart F. By clarifying insurer rights and obligations that were cited as concerns by the working group, this rulemaking makes available information relevant to insurers evaluating and addressing risks associated with corporate restructuring. Treasury recognizes that claim submissions and federal payments for insured losses may continue for years following a certified act of terrorism. Consequently, over time, processing difficulties may arise from a change in an insurer’s affiliation status whether or not more than one certified act of terrorism occurs in a Program Year. Within the scope of this rule and other constraints on Treasury in administering the claims process, Treasury will strive for ease of operations. This could, for example, involve recognition of alternative reporting structures where there is no impact on insurer deductibles and/or the amount of the Federal share of compensation owed to affected insurers. Treasury may make adjustments in its procedures, promulgate revised rules, or on a case-by-case basis enter into agreements with the involved parties to address administrative difficulties arising from changes in insurer affiliations once insured losses have been incurred.

IV. Procedural Requirements

Executive Order 12866, “Regulatory Planning and Review”. This rule is not a significant regulatory action for purposes of Executive Order 12866, “Regulatory Planning and Review,” and therefore has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act. Pursuant the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is hereby certified that the final rule will not have a significant economic impact on a substantial number of small entities. Treasury is required to pay the Federal share of compensation to insurers for insured losses in accordance with the Act. A condition of Federal payment is that the insurer must submit to Treasury, in accordance with procedures established by Treasury, a claim for payment and certain certifications. The Act itself requires all insurers receiving direct earned premium for any type of property and casualty insurance, as defined in the Act, to participate in the Program. This includes all insurers regardless of size or sophistication. The Act also defines property and casualty insurance to mean commercial lines of insurance without any reference to size or scope of the insurer or the insured. Accordingly, any economic impact associated with the proposed rule flows from the Act and not the proposed rule. The rule merely clarifies the point in time at which insurer affiliations are determined for purposes of the Program. A regulatory flexibility analysis is thus not required.

List of Subjects in 31 CFR Part 50

Terrorism Risk Insurance.

Authority and Issuance

For the reasons set forth above, 31 CFR is amended as follows:

PART 50—TERRORISM RISK INSURANCE PROGRAM

1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 321; Title I, Pub. L. 107–297, 116 Stat. 2322 (15 U.S.C. 6701 note).

2. Section 50.5(c) of subpart A is amended by adding § 50.5(c)(6) to read as follows:

(c)(6) See section 50.55 of this part for determination of an insurer's affiliates for purposes of subpart F.

3. Subpart F of part 50 is amended by adding § 50.55 to read as follows:

§ 50.55 Determination of Affiliations.

For the purposes of subpart F, an insurer's affiliates for any Program Year shall be determined by the circumstances existing on the date of occurrence of the act of terrorism that is the first act of terrorism in a Program Year to be certified by the Secretary for that Program Year.

Dated: June 8TH, 2005

Gregory Zerzan

Acting Assistant Secretary of the Treasury.